Omaha, Nebraska, via Kansas City, to Texarkana, Texas, the shipments passing over the line of the garnishee from Kansas City to destination. The shipments in all cases were charged for by the garnishee, and paid by Forrester Brothers, *at the published tariff rates.* Forrester Brothers afterwards presented a claim for "overcharges," *in an amount measured by the difference between the published tariff rate, and a less rate alleged to have been fixed by a private contract.* The plaintiff asserts this same claim in this case through the defendants, Forrester Brothers, by virtue of the garnishee process. *The garnishee contended in a court below, and contends here, that the plaintiff's claim is based upon a departure from published tariffs, and for that reason, is for a rebate pure and simple. The court below held that the private contract for less than the published tariff was lawful and enforcible, and rendered judgment accordingly."*

"Prior to August and September, 1901, *the garnishee and certain other railway companies had in force a legally established proportional rate of ten cents per hundred pounds on corn and oats from Kansas City, St. Joseph, Atchison and Leavenworth to Texarkana, Texas, and common points, applying on those commodities when shipped from other points into Kansas City, St. Joseph, Atchison or Leavenworth and thereafter moved over the line of the garnishee to Texarkana, Texas, and common points. This tariff applied on shipments of corn and oats from Omaha, Nebraska, and Council Bluffs, Iowa, and other common points taking the same rates, to Kansas City and then shipped over the line of the garnishee to Texarkana and common points,* (Rec., 112, 116, 138, 139-140, 144)."

On Page 3 it is said,

"There was a legally established local rate of nine cents on grain from Omaha, and common points to Kansas City. (Rec. 140). There was also a legally established rate of six and one-half cents

between *Omaha and common points, and Kansas City, known as the Missouri arbitrary, which applied on shipments originating at Omaha and common points and coming to Kansas City*, for shipment beyond that point. Rec. 39, 49, 125, 141.)" The Italics are ours.

A number of similar statements are found in the brief of the plaintiff in error. In fact, the entire argument of the garnishee, so far as the validity of the contract of Forrester Brothers is concerned, is predicated on the proposition that the contract of Forrester Brothers was in conflict with a rate lawfully established under the provisions of the Interstate Commerce Act, and for that reason the contract was invalid.

The Supreme Court of Kansas as early as the case of Hawley vs. Coal Company, 48 Kan. 593, and again in the case of Railway Company vs. Hubbell, 54 Kan. 232, held that any contract in conflict with a lawfully established rate applicable to the shipment in question is invalid and cannot be enforced, and even since the decision in this case in the case of M.. K. and T. R. R. Co. vs. Milling Co., cited in 80 Kan. Rep. at Page 141, the Supreme Court of Kansas adheres to its former rule. It will, no doubt, seem at least a little out of the ordinary and worthy of note, that the Supreme Court of Kansas should decide three cases, two before the case at bar and one since the decision in this case, and in all three cases adhere to the rule contended for by the garnishee, and in

this case make an exception, if the facts are as claimed by the plaintiff in error.

The Railroad Company, contended in the trial court that the contract of Forrester Brothers was in conflict with a legally established rate, and for that reason was void. (Rec., 18).

The same contention was made by the Railway Company in the Supreme Court of Kansas, (Rec. 300).

As to whether or not the contract was or was not in conflict with a legally established rate, applicable to the shipment in question, was purely a question of fact to be determined by the trial court from all of the evidence in the case, and, of course, could not be determined by simply taking certain portions of the testimony which were favorable to the garnishee and ignoring all of the other testimony which was before the court. The testimony contains about two hundred and sixty pages, much of which is in regard to the rates between Omaha and common points and Fort Smith or Shreveport. (Rec., from page 20 to page 161).

Section 5891 of the general statutes of Kansas 1909, reads as follows:

> "Upon the trial of questions of fact by the court, it shall not be necessary for the court to state its findings, except generally, for the plaintiff or defendant, unless one of the parties request it, in which case the court shall state, in writing, the conclusions of fact found, separately from the conclusions of law."

In construing the above statute, in the case of Shuler, et al, vs. Lashorn, 67 Kan. 699, the Supreme Court of Kansas said,

> "They do not show the "factum" of any contract whatever between Asa Shuler and Henry E. Shuler relating to the title of the land, but they expressly state that no such agreement, either oral or written, ever existed. Although not found to be true by the court the attorney for plaintiffs in error assumes all these things, and some others, to be established facts, and to be so material to the case as to require a reversal of the judgment.
>
> At least seven of the specifications of error are based upon matters suggested by fragments of evidence excluded from the findings of fact, but treated as of controlling importance. Forty-six of the fifty-three paragraphs of the brief supposed to be devoted to a statement of essential facts are occupied with detailing specific items of evidence as if they had been found by the court, while the ultimate facts embodied in the findings are ignored. Under these circumstances, in order to arrive at a decision, it is necessary to determine how far, if at all, the findings of fact are conclusive.
>
> This court has no authority to make findings of fact or to canvas evidence for that purpose. Its function is to review alleged errors. When the district court was requested to make findings of fact it was its duty to find the material facts established by the evidence so that exceptions might be taken to its views of the law involved in the trial. (Gen. Stat. 1901, Sec. 4737). Error in this respect will not be presumed but must be affirmatively shown."

Quoting from the case of Cowling vs. Greenleaf 33 Kan. 570, it is said,

> "If the plaintiff was not satisfied with the findings of fact, he should have asked the trial court to make further findings or modify those made."

and it is said in Shuler vs. Lashorn,

> "No motion was made for the modifications of any finding so as to include additional facts, and no request was made for any further or additional findings, and since no rulings upon those subjects were demanded, no errors in those respects can be alleged. Therefore, the plaintiffs in error are precluded from contending that the findings made do not embrace all the essential facts of the controversy established by the proof, and this court is precluded from considering any facts not found by the trial court."

In the case of Mushrush vs. Zarker, 48 Kan. 384, it is said,

> "It is earnestly contended by counsel for plaintiff in error that the land levied upon was not subject to sale upon execution; that there had been no abandonment of the homestead, or any portion of it, by the debtor and his family. This involves a question of fact. That question was submitted to the trial court and a general finding was made in favor of the defendants below. We are strongly impressed with the argument of counsel, and are inclined to the position taken by them upon the law of the case, but, unfortunately, the record is in such a condition that we cannot extend relief to the plaintiff in error. We cannot say there was an utter lack of evidence to support the general finding of the court. No special findings were asked or made by the court; so we only have the general finding and judgment of the trial court to guide us. We must adhere to the long-established principles and to the numerous decisions of this court, that the general finding of a court trying the case includes in it every material

> fact necessary to sustain it, and that where there is any evidence to support such general finding, a judgment based thereon cannot be disturbed by the Supreme Court.'

In this case the trial court made general findings of fact but made no special findings. The trial court simply found the amount of the indebtedness due from Forrester Brothers to the plaintiff, and the amount due from the garnishee to Forrester Brothers, and rendered judgment according to these findings. (Rec. 284-285.)

No special findings of fact were requested by the garnishee and no motion was made asking the court to make additional findings of fact. (Rec., 284-285).

In the findings made by the trial court no reference whatever is made to any freight rate or whether the same was established or was not established. (Rec. 284-285). No such findings were requested.

The Supreme Court of Kansas had no power to determine questions of fact and could only examine the evidence to ascertain if there was sufficient evidence to sustain the general findings of the trial court, under the cases just cited. The Supreme Court of Kansas in reviewing the evidence of the trial court in this case says:

> "The evidence abundantly sustains the claim of the plaintiff that a contract was made for the carriage of grain for Forrester Brothers, as claimed, to-wit: for a joint rate of sixteen and one-half cents, of which the Kansas City Southern agreed to accept eight cents per hundred as its proportion of the rate. This contract is es-

tablished by the officers who made it. There is no controversy in the evidence upon this question. (Rec.. 300).

It is also claimed that the Kansas City Southern Railroad had a legally established joint rate in connection with other lines between St. Joseph, Atchison, Leavenworth, and common points, through Kansas City to Texarkana and common points, and its proportion of such joint rate was ten cents a hundred and that this rate was the legally established rate which applied to all freight shipped south over the Kansas City Southern having no legal rate beyond Kansas City, and therefore the Forrester Brothers' grain had to be taken under this rate. For these various reasons, it is insisted that the eight cent rate made for Forrester Brothers was unlawful and void, and that the rate collected was the valid rate at the time.

We can not concur in this conclusion. The facts in the record, taken in connection with the judgment of the trial court, will not sustain this position. (Rec., 301).

The contract as alleged by the plaintiff having been clearly established, the burden was upon the defendant to show by way of defense, that such contract was for some reason unlawful. If the invalidity resulted from the existence of legally established rates with which the rate relied upon by the plaintiff was in conflict, it was incumbent upon the defendant to allege and prove such fact. Mo. Pacif. R. R. v. Relf, recently decided by this court;

Atlanta K. & N. Ry. Co. v. Horne, 106 Tenn. 73; 59 S. W. 134;

Southern Pacif. R. R. Co. v. Redding (Texas) 43 S. W. 1061;

Southern Kansas Ry. Co. v. Burgess, 90 S. W. 189. *This was not done.*"

Neither the trial court nor the Supreme Court of Kansas found that there was any established rate in conflict with

the rate given to Forrester Brothers; as that was one of the main questions in issue, and the facts are not found by the trial court and as the Supreme Court had no power to find the facts and as the contention of the garnishee on all of the evidence has not been sustained in the general findings, and as it has been decided in the cases hereinafter cited that on a writ of error to a state court in a law case that this Court will not enter into a consideration of the testimony, we are somewhat at a loss to know just how this court is to find the facts from fragmentary parts of the testimony different from what they were found by the state court.

It was recently stated by this Court in the case of Water-Pierce Oil Company vs. Tex. 53 L. ed. U. S. 424.

> "Nor does this court sit to review the findings of facts made in the State Court, but accepts the findings of the court of the State upon matters of fact as conclusions, and it is confined here to a review of the questions of federal law within the jurisdiction conferred upon this court."
> Quindy v. Boyd, 128 U. S. 489; 32 L. ed. 503; 9 Sup. Ct. Rep. 147.

The findings of a court on questions of fact, where a jury has been waived, are conclusive in the court of review.

Dooley v. Pease 180 U. S. 126; 45 L. ed. 457.

Mixed questions of law and fact submitted to the court in a trial without a jury are not reviewable by the Supreme Court.

St. Louis v. Rutz, 138 U. S. 226; 11 Sup. Ct. Rep. 337; 34 L. ed. 941.

Where the trial below is by the court without a jury, a general finding prevents all inquiry by the Supreme Court in the special facts and conclusions of law in which it rests.

Boardman v. Toffey, 117 U. S. 271; 6 Sup. Ct. Rep. 437; 29 L. ed. 898.

Questions of fact are not federal.

Barket v. Lockwood, 160 U. S. 357; 16 Sup. Ct. Rep. 334; 40 L. ed. 455.

Where the Supreme Court of a state decides a federal question in rendering a judgment, and also decides against the plaintiff in error upon an independent ground not involving a federal question and broad enough to maintain the judgment, the writ of error will be dismissed.

Hammond v. Ins. Co., 150 U. S. 633; 37 L. ed. 1206; 110 U. S. 222; 28 L. ed. 149; 98 U. S. 140; 25 L. ed. 114.

Harrison v. Morton, 171 U. S. 38; 18 Sup. Ct. Rep. 742; 43 L. ed. 63.

There has been no decisions against the validity of a federal statute where the state court simply denies facts sufficient to bring it within its operation.

Crary v. Dublin, 154 U. S. 619; 14 Sup. Ct. Rep. 119; 23 L. ed. 510.

This court has no power to review a state court on a question of fact.

Baslett v. Lockwood, 160 U. S. 357; 16 Sup. Ct. Rep.

334; 40 L. ed. 455.

Min. Co. v. Boggs, 3 Wall 304; 18 L. ed. 245.

THE EVIDENCE.

In the original brief filed in this Court by the defendant in error, we relied on the record and did not enter into consideration of the testimony. The claim of the garnishee that there was a conflict between the contract of Forrester Brothers and the lawfully established rate is not based on any findings of fact made by the State Court, but as an attempt is made to establish this conflict by reference to certain portions of testimony, which were not included in the findings of the State Court, it may not be inappropriate to make a few observations regarding the testimony upon which such contention is based.

But before doing so, it might be well to state a few propositions concerning which there is no dispute.

The Interstate Commerce Act did not fix rates. The Interstate Commerce Act, as it existed at the time of the shipments in question, gave no power to the Interstate Commerce Commission or to the Courts to fix rates. The right to make rates was left with the carriers under the act as it had been before the passage of the Act.

Inter. Commerce Com. v. Cin. N. O. T. P. R. Co., 167 U. S. 479, 17 Sup. Ct. Rep. 896; 42 L. ed. 243;

The Inter. Commerce Com. v. Ala. Midland R. Co., 168 U. S. 144; 18 Sup. Ct. Rep. 45; 42 L. ed. 414;

C. N. O. & T. R. Co. v. Inter. Com. Co., 162 U. S. 197; 16 Sup. Ct. Rep. 666; 40 L. ed. 939.
Ky. & Ind. Bridge Co. v. Louisville & Nashville R. Co., 2 L. R. A. 289.

The law simply provided that the charges should be reasonable; that there should be no unjust discrimination between shippers under substantially similar circumstances, and the rates fixed by the carriers should be filed with the Interstate Commerce Commission, and published as provided in the Act. It is not contended that a railroad could not have different rates and each rate be a legal rate, and the rate applicable to the particular shipment depend on the character of the shipment, i. e., whether it was a local shipment, a proportional shipment or a joint through shipment over two or more roads.

It is evident from the act itself that these rates, whether local, proportional, joint or through rates, should be made in the first instance by the proper officers of the respective railroad companies, and when so made should be filed with the Interstate Commerce Commission. The rate thus filed became a public document open to inspection and a written instrument in one of the departments of the Government.

The general statute of Kansas, 1909, Sec. 5977, provides:

> "Exemplifications from the books of any of the departments of the government of the United States, or any papers filed therein, shall be admitted in evidence in the same manner and with like effect as

the originals when attested by the officer having the custody of such originals."

To prove just what rates were in force at any given time over any particular line of railroad or railroads, should be a very simple matter under the above statute. We submit, however, that the entire evidence in this case does not show either the original or any authenticated copy of any freight tariff or document on file with the Interstate Commerce Commission on either the Northern Connecting lines or the Kansas City Southern Railway, the roads over which the shipments were made. The best evidence of any tariff filed would be either the original or a certified copy of the same. Neither the original or certified copy of any tariff over these roads was offered in evidence. Neither was there any showing made why they could not be produced, or that any attempt had been made to procure a duly authenticated copy of the records of the Interstate Commerce Commission regarding freight rates over these roads. Just what rates were filed with the Interstate Commerce Commission, or just what the records show regarding these rates cannot be determined from examination of all of the evidence in this case for the reason that they are not found in the evidence.

A number of witnesses were asked questions and answered questions concerning the rates between Omaha and Kansas City, and between Kansas City and Shreveport. (Rec. 22, 23, 24, 37, 48, 78, 84, 85, 97, 104, 105.)

From these questions it is quite evident that there were

a number of different rates. Some questions referred to local rates, some questions referred to the sum of the local rates, some questions referred to "Missouri Arbitrary" some referred to the joint through rate over these roads, and some to proportional rates. (Rec. 22, 25, 34, 35, 42, 43, 44, 98, 104, 118.) But whether or not any of these rates or all of them were filed and published in compliance with the Interstate Commerce Law, and just what they would show if these tariffs had been introduced in evidence, cannot be ascertained from an examination of all of the evidence in this case.

If a witness had any personal knowledge concerning a rate, he might detail the facts from which the courts might reach the conclusion, but the witness could not testify to conclusions, such as what rate was the legal rate.

> Wabash R. R. Co. v. Sloop, 98 S. W. Rep. 607, (Mo.); Gulf C. & S. F. Ry. Co. v. Leatherwood, 69 S. W. 119, (Tex.).

But in the absence of a showing that these rates were prepared, filed and published as the law requires, the trial court could not say whether they had been established in compliance with the Interstate Commerce law or not.

The testimony regarding these rates was not free from conflict and it is difficult to ascertain from many of the questions, and from many of the answers, whether they referred to a local rate, proportional rate, or a through rate. Whatever the rates were, was not shown by either the

original or an authenticated copy of the files or records of the Interstate Commerce Commission, or by any witness who claimed to have personal knowledge of these records.

The garnishee did not offer in evidence any schedule of rates between Omaha and Texarkana. It did offer in evidence two amended tariffs which expressly provided that the rates stated therein were "joint proportional rates" and "applying in connection with the following lines," (naming them). (Rec. 111, 116).

In these tariffs no reference whatever was made to the Northern Connecting Lines. Neither was the original tariff, even in the roads included in these amended tariffs, offered in evidence. The garnishee did not rely on these schedules to prove that the rates were applicable to the shipments in question; but undertook to supplement this testimony with the testimony of a number of other witnesses. (Rec. 117, 94-106, 61-75).

It is now suggested that all other testimony regarding rates be excluded, and that these tariffs are the only evidence to be considered, and that it must be concluded from them without any consideration of the other testimony that they are the rates that were applicable.

It is the contention of the defendant in error that as there were no special findings of fact made by the trial court, and no schedule of rates is contained in the facts stated by the Supreme Court, that even if this court

should enter into consideration of the testimony, before it is justified in reaching the conclusion claimed by the garnishee, that it would not only have to find that the tariffs claimed were applicable to the shipment, but also that there was no other legal rate in force between the points of shipment which applied to the shipments in question in this case.

It is our contention that even though the court should find that the rate claimed by the garnishee was a legal rate, (as it did not include the same roads between the same points over which Forrester Brothers' shipments were made,) the court cannot presume that their contract with the Railroad Company was illegal, in the absence of any showing as to what other rates were on file with the Interstate Commerce Commission on these roads, at the time of shipment.

The fact that two or more roads have one joint tariff does not prevent one of the roads from having a different joint rate with other roads, neither does it raise a presumption that it does not have such rate.

> Little Rock and Memphis R. R. Co. v. St. Louis, and S. W. R. R. Co., 63 Fed. Rep. 775; 26 L. R. A. 195, and cases cited.

It is suggested, however, that notwithstanding there were no findings of fact made by the trial court, except those found on page 284 of the record, and notwithstanding no mention is made by the findings of the trial court

of any tariff rates, (as might have been done if requested by the garnishee or the parties), it is nevertheless claimed that this defect is supplied by the stipulation found on pages 108, 109 of the record.

The stipulation itself shows that the contention of the garnishee in this regard is not tenable. (Rec., 108, 109). All that the stipulation referred to admitted is that certain exhibits were sent to the Interstate Commerce Commission and filed.

It is expressly stated in the stipulation, that,

> "The plaintiff reserves the right to object to the materiality or relevancy of these documents and the plaintiffs do not admit that any of said papers show without further proof any official force and effect in themselves. What they prove, if anything, and their legal effect is not admitted.' (Rec., 109).

It was not admitted in this stipulation or elsewhere that the printed papers referred to were the official acts of any officer of any Railroad Company or that they were prepared by such officers, or that there was any joint traffic relations ever made or consented to by the officials of the different roads named in these documents, or that they were ever signed by the officials. It was not admitted that there was any order made regarding their publication by the Interstate Commerce Commission, or if an order was made that the required publication had been made. Besides, the exhibits referred to are not made a part of the stipulation. They are simply referred to in the stipu-

lation. What they contain and their legal effect can only be determined from examination of the evidence in this case. It cannot be determined from the stipulation or from the findings of fact made by the trial court or Supreme Court of Kansas. Neither can the legal effect be determined from the exhibits referred to without an examination of all of the other evidence offered on the trial regarding freight rates.

From a consideration of all of the testimony offered the trial court found against the garnishee on all disputed questions of fact. As there was a conflict of testimony and the burden was on the garnishee to prove its defense, it was the province of the trial court to weigh all testimony and to decide the disputed questions of fact, and the garnishee is concluded as to the facts by the decision of that court.

The authorities cited in the brief of the garnishee to the effect that a contract which conflicts with a lawfully established freight rate is invalid and cannot be enforced, have no application in this case, for the reason that no such findings of fact were made, and the garnishee failed to prove this contention.

We have been unable to find any decision, either State or Federal, which holds that a contract based on an unpublished rate applicable to the rate of shipment in question, cannot be enforced, as between the carrier and

shipper, when the rate is not shown to be unjust and unreasonable or does not discriminate either in favor of or against other shippers on same haul, or does not conflict with a lawfully established rate which is applicable. The validity of such contracts has been upheld in the following cases:

Mo. Pacif. R. R. Co. v. Reif 78 Kan. 463;
Wabash R. R. Co. v. Sloop (Mo) 98 S. W. 607;
Southern Kan. R. R. Co. v. Burgess (Tex) 90 S. W. 189;
Gulf R. R. Co. v. Leatherwood 69 S. W. 119;
Railway Company v. Horn (Tenn). 59 S. W. 134;
Laurel Cotton Mills Co. v. G. and S. I. R. Co. 37 Southern Rep. 134;
Southern Pacif. R. R. Co. v. Redding 43 S. W. 1061;
Va. Coal and Iron Co. v. Louisville N. R. Co. 74 S. E. Rep. 315;
Cherry v. Chicago and Alton R. Co. 191 Mo. 489; 2 L. R. A. (N. S.) 695;
90 S. W. 381;

The principle involved in this case comes clearly within the right to contract recognized by this court.

Southern Pacif. R. R. Co. v. Inter. Com. Com. 200 U. S. 555; 50 L. ed. 593;
Inter. Com. Com. v. Baltimore R. R. Co. 3 Inter. Com. Rep. 192;
Cincinnati and N. O. and T. P. R. Co. v. Inter. Com. Com. 162 U. S. 184, 197; 40 L. ed. 935, 939;
5 Inter. Com. Rep. 391; 16 Supt. Ct. Rep. 700.

THE DECLARATIONS OF LAW.

It is claimed that the trial court erred in certain declarations of law. These declarations of law do not pur-

port to be based on any findings of fact made by the State Court. They are simply abstract propositions of law submitted to the trial court after the court decided the case. (Rec., 285, 286).

The trial court made no special findings of fact except those found at page 284, 285. Most of the declarations of law do not purport to be conclusions deduced from the facts found by the State Court, but, as we claim, were simply certain abstract principles submitted to the court, and the trial court was asked to state whether this proposition is the law or is not the law, and this without any special finding of the trial court as to whether the propositions complained of were necessarily involved in the case on trial. Besides, these declarations of law were not submitted to the court until after the case was decided by the trial court. (Rec. 286, 287).

It is the contention of the defendant in error that no error can be predicated on any of these declarations of law for the reason that they are simply abstract propositions and passed upon after the case was decided, and do not purport to be legal conclusions deduced from the general findings made by the trial court, no special findings having been made.

In the case of Mills v Green, 159 U. S. 651; 16 Sup. Ct. Rep. 132; 40 L. ed. 294, it is said:

> "The duty of this court as of every judicial tribunal is to decide actual controversies by judg-

ment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principle or rules of law which can not effect the matter in issue in the case before it."

In the case of Mayre v. Parsons 114 U. S. 325, it is said,

"No court sits to determine questions of law *in thesi*."

Where the judgment itself is correct it will not be reversed on an appeal because the court has based its decision on erroneous or insufficient grounds, or has stated no reasons for the decision. 3 Cyc. 291, and cases cited.

The ground on which the court below proceeded is not a subject of inquiry in the Appellate Courts. 3 Cyc. 221, and cases cited. Also McClug v. Silliman, 6 Wheat. (U. S.) 598; 5 L. ed. 340.

It is claimed by the garnishee that the trial court erred in these declarations of law because he did not declare the law to be, (1st) that the State Court had no jurisdiction in a controversy between a shipper and a railroad company regarding freight rates, and (2nd), the shipper could not enforce a contract against a railroad company unless it was proved that there were tariff rates on file with the Interstate Commerce Commission corresponding to the contract. In other words, in the absence of any tariff being filed at all, that the contract could not be enforced and that the burden was on the shipper to

allege and prove that the tariff was filed in accordance with the contract before he could enforce it.

We submit that the court did not err in these declarations of law. The trial court held that when there were published rates applicable to the shipments that the only lawful rate that could be applied would be the published rate. (Rec. 287, 288 No. V.)

The substance of all of the other propositions was either that the State Court did not have jurisdiction or the contract could not be enforced in the absence of a rate being filed, even though it did not conflict with any established rate, or was not shown to discriminate in favor of or against shippers, or that it was not unjust or unreasonable in itself.

The vice of declaration No. 2, Rec. 287, is apparent. It would make the lawful rate the published tariff rate although it had never been filed with the Interstate Commerce Commission and established according to law, while it would make unlawful a joint rate that had been agreed upon between the carriers filed with the Interstate Commerce Commission, but which had not been published according to law and would also make it illegal to make a contract if there was no rate filed or published.

There Was Privity of Contract Between Forrester Brothers and the Kansas City Southern Railway Company.

It is also claimed that the contract of Forrester

Brothers, though valid, cannot be enforced for the reason that there was no privity of contract between Forrester Brothers and The Kansas City Southern Railway Company, and some decisions are cited to the effect that where there is no direct contractual relation between the parties, and there is a contract between two parties for the benefit of the third, that the courts will not enforce such a contract for the benefit of such third party. These cases have no application to this case for the reason that there was an abundance of testimony to show a direct contract between Forrester Brothers and The Kansas City Southern Railway Company, and both the trial court and the Supreme Court so found. (Rec., 284, 285, 300).

The cars were ordered direct by Forrester Brothers from the Kansas City Southern Railway Company and it agreed with Forrester Brothers to furnish them, and it agreed with Forrester Brothers on the amount of freight that they should pay the Kansas City Southern Railway Company as its part of the through haul. This agreement was made through Schaufler first, and afterwards taken up both through the officials of The Kansas City Southern Railway Company and Forrester representatives, and one of the Forrester Brothers direct. (Rec. 21-39 Inclusive, 48, 54, 55, 98 105, 176, 77, 78).

This established a sufficient contractual relation to show privity of contract between the parties and to show a direct liability of the carrier to the shipper on the con-

tract.

Clark v. Ulster and Del. R. Co. 13 L. R. A. (N. S.) 164;
189 N. Y. 93, 81; N. E. 766; and cases cited.

It is conceded that the carriers might agree on a joint through rate and that the portion that each should receive need not be filed or published with the Interstate Commerce Commission. In this case the carriers not only agreed between themselves on the joint through rate between the point of origin and the point of destination, but each carrier, in addition thereto, agreed not only between themselves, as to the through charge and the amount that each was to receive, but also agreed with the shipper the amount that the shipper should pay to each carrier and where it should be paid. (Rec., 286, 300).

The first carrier kept its part of the agreement with the shipper, the second carrier violated its agreement and charged Ten Thousand Five Hundred and Twenty-seven Dollars and Fifty-five Cents ($10,527.55) in the aggregate in excess of the amount that it agreed to charge the shippers for its part of the haul. (Rec., 284, 286).

In the absence of any showing why it is legally entitled to this money, it certainly has not been deprived of any right, title, privilege or immunity under the Interstate Commerce Law, and the writ of error, we submit,

should be dismissed or the judgment of the state court affirmed.

Respectfully submitted,

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